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92-1075

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES E. GARNER, *Petitioner*,

v.

COLORADO STATE DEPARTMENT OF PERSONNEL
and COLORADO STATE DEPARTMENT OF REVENUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO STATE COURT OF APPEALS

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88 pp

QUESTIONS PRESENTED

The questions below concern guarantees of procedural due process and equal protection of the laws under Amendments V and XIV of the U.S. Constitution as they relate to state administrative hearings and their appellate review.

1. May a state regulation deny discovery of documents in the sole evidentiary hearing provided by law on grounds of confidentiality when in fact disclosure of the contested documents could not conceivably have harmed the public interest?

2. Is it harmless error when hearing officers, required by regulation to obtain *all* documents (including confidential documents) relied on by the agency making the decision under appeal, fail to review relevant documents, especially those petitioner had specifically requested but was not permitted to see?

3. In an appeal of rankings based on

answers on a civil service test, does a hearing meet constitutional requirements when it fails to review the answers submitted by the three eligible candidates and by the petitioner, and the scores their answers received?

4. Does a court of appeals abuse its discretion when it finds *inter alia*, against the clear facts on the record, that petitioner raised no issues in connection with the confidential documents he was not permitted to see and, therefore, dismisses his appeal?

5. May a court of appeals strike petitioner's arguments it claims he failed to present at the administrative hearing, if in fact these arguments concerned documents denied to respondent until he received the agency's position paper and to which he was afforded no opportunity to reply at the administrative hearing?

LIST OF PARTIES

The parties to the proceedings below were the petitioner James E. Garner and the respondents Colorado State Department of Personnel and Colorado State Department of Revenue.

The petitioner and respondents before this Court are the same parties as below.

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COLORADO STATE DEPARTMENT OF PERSONNEL and COLORADO STATE DEPARTMENT OF REVENUE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO STATE COURTS OF APPEALS

The petitioner James E. Garner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Colorado State Court of Appeals, entered in above-entitled proceeding on January 16, 1992.

OPINIONS BELOW

The opinion of the Colorado State Court of Appeals is reported at 835 P2d. 527 (1992), and appears in the appendix hereto, p. 3a, *infra*.

The order decision of the Colorado State

District Court, City and County of Denver, filed July 10, 1990, and the Decision of the Director/Review Panel Regarding Selection and Examination Process Appeal, issued June 20, 1989, have not been reported. They appear in appendix hereto, p. 20a, *infra*, and p. 26a, *infra*, respectively.

The Colorado State Supreme Court denied Petition for Writ of Certiorari to the Colorado State Court of Appeals on August 31, 1992.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Colorado State Court of Appeals is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution,

Fifth Amendment:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

Fourteenth Amendment:

...nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws ...

Colorado Revised Statutes,

C.R.S. 24-50-112(3)(a):

The state personnel director shall establish administrative procedures governing the conditions under which applications will be accepted, the procedures by which tests will be held, the frequency with which candidates may compete in the same examination, and the standards by which candidates will be deemed qualified. The state personnel director shall establish procedures governing the selection and examination process, which shall be uniformly used by the principal departments. The state personnel director shall set procedures for appeals concerning the selection and examination process. Pursuant to board rule, the director shall set procedures for certification of a person to a position when there is an appeal pending on any part of the selection and examination process for that position. The state personnel director or, at his delegation, a three-member panel shall hear any appeal concerning the selection and examination process. The appeal shall be heard within sixty days after the written appeal has been received by the state personnel director. Said director or panel shall review the appeal in summary fashion on the basis of written material, which may be supplemented by oral argument at the discretion of the director or panel. The director or panel shall issue a written decision within thirty days of completion of the hearing. The selection and examination process may be overturned only if the director or panel finds it to have been arbitrary, capricious, or contrary to rule or law. If the panel or director does not issue

such a decision within thirty days of completion of the hearing, the selection and examination action shall be final. Any decision of the panel or final action of the state personnel director shall be subject to judicial review pursuant to section 24-4-106. The state personnel director's designee shall be a member of the panel and the presiding officer of such panel. One panel member shall be selected by the aggrieved employee or applicant. The third panel member shall be selected jointly by the panel member selected by the aggrieved employee or applicant and the state personnel director's designee. All members of the panel shall have demonstrable knowledge of and experience with the state examination selection rules and procedures. The state personnel director shall maintain a list of all potential qualified panel members. Such list shall be compiled by the state personnel director from names of persons possessing the required knowledge of and experience with the state examination and selection rulers and procedures as submitted to the state personnel director from appointing authorities, employee organizations, and other interested parties. All members of the panel shall be selected from such list.

C.R.S. 24-72-204(2)(a):

Allowance for denial of inspection-grounds-procedure-appeal ... The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on ground that disclosure to the applicant would be contrary to the public interest ...
(II) Test questions, scoring keys, and other examination data pertaining to the administration of a licensing examination, examination for employment, or academic examination; except that written promotional examinations and the scores or results thereof

conducted pursuant to the state personnel system or any similar system shall be available for inspection, but not copying or reproduction by the person in interest after the conducting and grading of any such examination...

4 *Code Colo. Reg.* 801-2 (1987), *Procedures for Appeals and Hearings,*

P10-3-12(B):

Agency or Appointing Authority. The responding agency or appointing authority shall file with the director, within 35 days of receipt of the appeal by the director, a position statement not to exceed 10 pages in length. Additionally, the agency or authority must also provide to the director or panel members within such 35 days all the information and documentation which was relied on by the auditor, appointing authority, or agency in making the decision being appealed. This information (except confidential material) shall be made available to the appellant by the agency for inspection prior to the time the appellant is required to file his written position statement. The appellant must pay the reasonable cost of any copying he requests.

P10-3-13(A):

Special Procedures for Confidential Examination Materials. Examination data and documents that are pertinent to future examination and selection processes will be filed only with the director in a sealed envelope to be opened by the director or panel members for their use in the review process. Such documents may include, but are not limited to: test questions, scoring keys and scores and results thereof. The responding party may, at its discretion, include other examination documents or data in the sealed envelope where potential

release of such information to the public would be contrary to the public interest or would compromise future examination and selection processes.

STATEMENT OF THE CASE

How The Federal Question Was Raised

At the earliest stage of the proceedings below, the administrative hearing, petitioner asserted his right of discovery and other procedural due process in his position statement, which speaks of these issues at length (see appendix hereto, p. 36a, *infra*). An appendix to that position statement was a copy of Martinelli v. District Court, 612 P.2d 1083 (1980), which conditionally upheld discovery of confidential documents on the basis of the due process clause of the XIV Amendment and federal case law, as well as Colorado Rules of Civil Procedure. However, the review panel ruled it had no authority to grant relief in matters of discovery.

In appeal to the District Court petitioner again raised issues of procedural due process

in the complaint which opened the appeal (paragraphs 5-9; 10-13) and in his opening brief (Court of Appeals record pp. 77-81; 90-93). Furthermore, petitioner's reply brief stated:

> ... the due process clauses of the U.S. and Colorado Constitutions would entitle plaintiff to a hearing even if it were not provided by statute. Furthermore, a hearing passing constitutional muster would not only permit discovery, but would also permit the plaintiff to call expert witnesses and to cross examine and impeach testimony (Court of Appeals record, p. 155).

The District Court ruled, however, that "the due process issue raised by the plaintiff has no merit. White v. Office of Personnel Management, 787 F.2d 66 (D.C. Cir. 1986); Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1988)" (appendix hereto, p. 23a). In citing federal case law, the District Court had ruled on a federal question.

Petitioner's opening brief to the Colorado State Court of Appeals stated in a point heading:

> The District Court erred in ruling that discovery and other due process rights in appeals taken under C.R.S. 24-50-112(3)(a) are not protected under the due process clauses of the Colorado and U.S. Constitutions (p. 8).

The decision of the Court of Appeals took note that petitioner had asserted due process rights under both state and federal law:

> Plaintiff first contends that he was improperly denied his right of discovery under the APA[1] to certain examination-related materials in his administrative appeal. Plaintiff also contends, alternatively, that his due process rights were violated in the administrative appeal process by the denial of access to certain materials he requested, as well as by the lack of opportunity to call expert witnesses, to cross-examine witness, and to present rebuttal. We find no reversible error in the procedures followed here (appendix hereto, p. 6a).

The court thus considered and expressly rejected this constitutional claim.

Statement of Facts

Petitioner was one of six candidates meeting the eligibility requirements who completed the civil service test administered

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[1] APA is the Colorado state administrative procedures act.

by the Colorado State Department of Revenue (hereinafter Revenue) for the position of state lottery director in February 1989. The test consisted of two essay questions, or "written exercises" as Revenue called them, mailed to candidates and administered on the honor system (test in appendix hereto p. 46a, *infra*).[2]

Notified in March 1989 that he had not ranked among the top three candidates who would be eligible for the position, petitioner appealed the results of the examination to the State Department of Personnel (hereinafter Personnel). In accordance with C.R.S. 24-50-112(3)(a), a three member panel was convened to hear the matter in summary fashion on the basis of written material.

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[2] No substantive claim concerning the need for confidentiality of this specific test or any associated documents was ever put forward. In fact, the rating guidelines, formerly classified, were faxed to petitioner by counsel for Revenue, without request for protective order, when petitioner noted they were missing from record on review.

To meet the April 25, 1989 deadline for submitting his position paper, petitioner sent six letters between March 17 and April 18 to Personnel or Revenue, with copies to the other agency, seeking materials needed to prepare his case (agency record, pp. 1-3, 47-49, 51-53, 55, 57, 61). These letters clearly specified what was being requested, and petitioner explained that he was requesting these items pursuant to his right of discovery.

Revenue denied petitioner most of the items he requested on the grounds that they were confidential test materials exempted from disclosure by the Open Public Records Act (agency record, p. 65 item 2). Petitioner asked Personnel to compel discovery under the APA and explained the legal basis for his request. Further request for discovery was made in position statement (agency record, pp. 23-27). Despite these requests, petitioner was denied discovery of the following documents essential to preparing his case:

(a) Examination answers submitted by the six job candidates, including himself, for the position of state lottery director.

(b) Documents showing the component scores, and scoring explanations, by each of the three test evaluators for each of the six sets of examination answers.

(c) Examination construction record, including (1) job analysis, (2) all sources used in the job analysis and the names, qualifications, and contributions of all subject matter experts, (4) the examination plan, and (5) the name and title of the exam constructor.

(d) Rating guidelines, including an answer key, or a certification that either of these did not exist.

(e) Instructions to evaluators on how to score the examinations (agency record, pp. 1-3, 47-49, 55, 57, 61).

Because petitioner could not inspect these items, he could not submit them with his

position paper. As a result, the record does not contain, and the appeal panel never saw: examination answers by any of the six candidates, the examination construction record demonstrating the rational basis for the test, or instructions to evaluators on how to evaluate or score the examinations.

In June 1989 Personnel issued the decision of the review panel, which claimed no authority to grant petitioner relief in matters of discovery and rejected his claims that the examination process was arbitrary, capricious, and otherwise contrary to rule and law.

The hearing procedures require appellant to submit his position paper first and the agency to file its position paper in response. However, procedures do not afford appellant an opportunity to submit a rebuttal. Though appellant hurriedly issued a short rebuttal anyhow, it was outside the prescribed procedure and may not have received consideration. As the panel was to begin its deliberations upon

receipt of the agency paper, there was no time to evaluate the many documents appended to the agency paper. Therefore, petitioner had no meaningful opportunity to reply to these documents, many of which should have been made available in discovery (see *Procedures for Appeals and Hearings* P10-3-12(B) above), until his appeal in the District Court.

In July 1989 petitioner filed his Complaint and Appeal of Final Agency Action in the District Court, City and County of Denver. District Court entered final order of judgment in July 1990 upholding the agency action. The ruling rejected petitioner's arguments that he was entitled to discovery and other due process rights in the administrative hearing and denied his request to vacate the examination results.

In August 1990 petitioner filed his Notice of Appeal from District Court Review of Agency Action, and in January 1992 the Colorado State Court of Appeals affirmed the decisions of the District Court and the review panel.

While the Court agreed that the hearing failed to follow appeals procedure P10-3-12(B), which required the panel to be provided with all information relied on in making the decision under appeal, it found this to be "harmless error" on the grounds that "plaintiff did not raise any issues before the panel which would have required it to review the examination answers" (appendix hereto, p. 14a).

In fact, petitioner raised every issue that could possibly have been raised in connection with the answers by someone who was not permitted to see the answers, the scores given to the answers (not even his own), or the rating guidelines.

For example, petitioner asserted in his position statement, "I am at a loss to imagine what instructions would have enabled evaluators to infer level of analytical ability from the two essays we wrote" (agency record, p. 29); "inferences of marketing knowledge and ability from these essays would be arbitrary" (p. 29);

"without marketing expertise, [the] professional judgment [of the test scorers] in marketing would be wholly arbitrary ... in scoring the exercises" (p.29); "evaluators were caused to prejudge candidates on the basis of their experience before they made a detailed evaluation of performance of performance on question 1" (p. 33); "'the number of staff members, size of budget' under our control ... was a major determinant of ratings on all factors, as the number of employees reporting to us (as listed on the application form and, no doubt, the essays too) was very strongly correlated with overall evaluations" (p. 35). Similarly, the position paper rebuts comments that plaintiff's answers were too "theoretical" or "textbook" in nature, defends his suggestion for a limited use of consultants, and questions why his suggestion to reinstitute the lottery as an independent government corporation (on the model of Quebec or Kentucky) did not receive more points (p. 37).

The Court also ruled that "most" of the petitioner's arguments challenging the propriety of the selection and examination process were not raised in the administrative appeal (appendix hereto, p. 17a). The Court may have been alluding to analyses of documents petitioner first obtained as appendices to the agency's position paper.

One such argument, dealing with an apparent conflict of interest, may provide this Court a better picture of this case if it were permitted to be tried on the merits.[3]

The record shows that Revenue's executive director played at least seven roles, properly carried out by different individuals, in the examination and selection process. He served

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[3] Employment practice in a civil service merit system involves the clear separation of two distinct functions: (1) the certification by an independent party of the three eligible candidates for a position and (2) the selection of one by the hiring authority. Without this separation, the whole certification process would be pointless.

as a subject matter expert (agency record, p. 197 paragraph 2); he was direct supervisor of the other two subject matter experts (p. 197 paragraphs 4 and 5); he determined the employee characteristics he wanted selected by the test (p. 197 paragraphs 4 and 5); he alone set the factor weightings of the test (p. 199 paragraph 3); he advised and supervised his personnel director in the construction of the test (pp. 139, 197); he selected the panel of test evaluators, one of whom he supervised (p. 4 of Revenue's answer brief, paragraph 2, record pp. 120-121); and he decided which of the eligible candidates to hire (agency record p. 197 paragraph 2).

It should be added that the executive director oversaw the development of the examination, which is largely an evaluation of experience disguised as a test, <u>after</u> Revenue had reviewed the resumes and applications of the eight eligible candidates (agency record, p. 197 paragraph 6; p. 198 paragraph 1).

REASONS FOR GRANTING THE WRIT

I

The Colorado State Court of Appeals has decided a substantial federal question in which constitutional due process rights are restricted by the state's need for test confidentiality and the expeditious resolution of appeals of civil service tests.

The decision of the Court of Appeals, if allowed to stand, creates a broad exception to the due process rights under the XIV Amendment that could affect the majority appeals of state and local civil service tests in the country. For instance, the Court ruled that, on grounds of confidentiality, appellants may not inspect answers and the scores of other candidates, the rating guidelines and answer key, and the examination construction record showing the rationale for test design.

Yet these are the items relevant to most of the appeals we could imagine, and it is hard to imagine how to evaluate the fairness of a test without them. Furthermore, the decision upholds a blanket denial of these items whether

or not any potential harm to the public interest from disclosure has been alleged.

The review of documents by a judge or hearing officer in camera is an accepted way of handling truly confidential materials in civil litigation. This appears to have been the intent of P10-3-12(B) of the Colorado Procedures for Appeals and Hearings, *supra*, when it required the panel to be provided with all the information relied on by the agency in making the decision under appeal. The regulation recognizes that appellants cannot raise all relevant arguments and issues arising from confidential documents. Therefore, the panel may review issues appellant was unable to raise.

In contrast to the in camera procedure, the decision holds it harmless error when the agency withholds from the panel the scored answers of the three eligible candidates and the petitioner.

In Hicks v. Crown Zellerbach, 319 Federal

Supplement 314 (1970), the U.S. District Court found that:

> ... the choice of appropriate tests for an employer is a difficult procedure requiring careful study and evaluation. Without such study, even experienced psychologists concede that they can do no more than make guesses, which are often completely wrong.

Given the technical nature of personnel testing, it seems obvious that expert testimony may be needed to shed light on the fairness and objectivity of a civil service test. Yet the decision has upheld summary procedures that amount to a blanket rejection of expert testimony irrespective of the circumstances of the case.

Similarly, the decision finds nothing unfair in providing agencies with the right of rebuttal, while denying appellants that right.

This case presents several important issues concerning the balance between due process rights appeals of civil service tests and the public interest. It affords this Court opportunity to build upon the federal case law

in this area and provide guidance in federal due process requirements to the states.

II

Serious errors in the state court decision call for the exercise of the Supreme Court's supervisory power.

As shown in the Statement of the Case, *supra*, the state court's finding that petitioner failed to raise any issue that would require the panel to review the scored answers contradicts the clear facts on the record. This was pointed out in Petition for Rehearing, but the decision was not modified.

More important, however, is that petitioner was denied discovery of these documents, of which fact the state court was well aware. In most circumstances, a party cannot raise issues in connection with documents he has not seen. It is blatantly unfair, therefore, to penalize petitioner for supposedly not raising these issues.

Furthermore, even without petitioner's arguments concerning these documents on the

record, the test answers and their scores are a central issue to this appeal, which came in response to rankings based on these scores. Similarly, it is not reasonable to find that an agency decision is supported by substantial evidence when the key pieces of evidence, the scored answers, are not in the record. After all, the essence of the agency decision under appeal was that the three certified candidates submitted better essays than the petitioner.

Another error is the resilient finding that the examination construction record was properly withheld from petitioner as confidential material. On no fewer than six occasions did petitioner specifically request the basis for this claim (opening brief, p. 16). The decision finds authority for this claim in P10-3-12 and C.R.S. 24-72-204(2)(a)(II), the Colorado Open Records Act (ORA). However, the items constituting the examination record (see Statement of Case, *supra*), do not have the characteristics of

"test questions" and "scoring keys" the public has an interest in restricting. On the other hand, to restrict the examination construction record as "other examination data" would construe that phrase so broadly as to preclude release of virtually anything to do with testing, contrary to the intent of ORA.

Each of the above singly is reversible error. Individually, and especially taken together, these errors merit supervisory correction by this Court.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Petitioner

APPENDIX

DENIAL OF CERTIORARI
BY
COLORADO STATE SUPREME COURT

SUPREME COURT, STATE OF COLORADO
CASE NO. 92SC197
CERTIORARI TO THE COLORADO COURT OF APPEALS, 90CA1458
DENVER DISTRICT COURT, #89CV10507

ORDER OF COURT

JAMES E. GARNER,

Petitioner,

V.

COLORADO STATE DEPARTMENT OF PERSONNEL and COLORADO DEPARTMENT OF REVENUE,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 31, 1992.

cc: James E. Garner, Pro Se
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East Windsor, New Jersey 08520

Honorable Robert S. Hyatt
Denver District Court
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Michael P. Serruto
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Colorado Court of Appeals

OPINION BY
COLORADO STATE COURT OF APPEALS

COLORADO COURT OF APPEALS January 16, 1992
No. 90CA1458

James E. Garner,

Plaintiff-Appellant,

V.

Colorado State Department of Personnel and Colorado State Department of Revenue,

Defendants-Appellees.

Appeal from the District Court of the City and County of Denver
Honorable Robert S. Hyatt, Judge
No. 89CV10507

Division II JUDGMENT AFFIRMED
Opinion by JUDGE TURSI
Jones and Rothenberg, JJ., concur

James E. Garner, Pro Se

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Maurice G. Knaizer, Deputy Attorney General, Michael P. Serruto, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

Plaintiff, James E. Garner, an unsuccessful applicant for the position of state lottery director, appeals from the district court judgment affirming the decision of an administrative appeals panel which upheld the action of the Department of Revenue in the selection and examination process conducted for that position. We affirm.

Administrative appeals concerning the selection and examination process for positions in the state personnel system are authorized and governed by §24-50-112(3)(a), C.R.S. (1988 Repl. Vol. 10B), which also provides for judicial review of final action in such matters pursuant to §24-4-106, C.R.S. (1988 Repl. Vol. 10A) of the state Administrative Procedure Act (APA).

In March 1989, plaintiff was notified by the Department of Revenue that his score on the written examination for the state lottery director position was not high enough to place him on the eligible list for that position.

Plaintiff appealed the selection and examination process conducted for that position to the state personnel director, and his appeal was heard by a three-member administrative appeals panel. See §24-50-112(3)(a).

The panel rejected each of plaintiff's specific arguments concerning the procedures followed in the administrative appeal process and concerning the content and conduct of the examination given. Rather, the panel ruled that it was not empowered to permit discovery of certain confidential examination materials which were denied to plaintiff and that the agency had followed acceptable practice in the development, conduct, and scoring of the examination. Thus, the panel upheld the agency action and ordered the examination results to stand, ruling that the actions of the agency were not arbitrary, capricious, or contrary to rule or law.

On judicial review, the district court

affirmed the panel's decision, and this appeal followed.

I.

Plaintiff first contends that he was improperly denied his right of discovery under the APA to certain examination-related materials in his administrative appeal. Plaintiff also contends, alternatively, that his due process rights were violated in the administrative appeal process by the denial of access to certain materials he requested, as well as by the lack of opportunity to call expert witnesses, to cross-examine witnesses, and to present rebuttal. We find no reversible error in the procedures followed here.

The nature and scope of administrative appeals concerning the selection and examination process is set forth in §24-50-112(3)(a), which provides, in pertinent part, that such an appeal "shall be heard within sixty days" after receipt by the state personnel director and that the director or

panel "shall review the appeal in summary fashion on the basis of written material, which may be supplemented by oral argument at the discretion of the director or panel." (emphasis added) Thus, this statutory scheme establishes only a limited and expedited appellate procedure for the conduct of selection and examination process appeals by the panel.

Consequently, although we agree with plaintiff that the summary review procedure of §24-50-112(3)(a) conflicts with certain APA provisions governing the conduct of full evidentiary hearings before state administrative agencies, including the APA provisions concerning discovery and the presentation of evidence, nevertheless, we hold that such APA provisions do not apply to the conduct of selection and examination process appeals under §24-50-112(3)(a). See §24-4-107, C.R.S. (1988 Repl. Vol. 10A); Colorado State Board of Medical Examiners v. Reiner, 786 P.2d 499 (Colo. App. 1989).

However, although plaintiff thus had no discovery rights under the APA in his administrative appeal, he nevertheless was entitled to have access to certain information in the administrative appeal process pursuant to the pertinent regulations of the state personnel director, which were promulgated as expressly authorized in §24-50-112(3)(a). See State Personnel Director's Administrative Procedures, P10-3-1, et seq., 4 Code Colo. Reg. 801-2 (1987).

Under the director's regulations, each party to a selection and examination process appeal is required to file a written "position statement" for review by the panel, and the hiring agency is also required to provide the panel with "all the information and documentation which was relied on by the ... agency in making the decision being appealed." The regulations further provide that: "This information (except confidential examination material) shall be made available to the

appellant by the agency for inspection prior to the time the appellant is required to file his written position statement." Administrative Procedure P10-3-12(B), 4 Code Colo. Reg. 801-2 (1987).

However, "confidential examination material," which includes "test questions, scoring keys and scores or results thereof," is required to be filed in a sealed envelope for review by the panel only, although the agency must also provide a list of such documents filed to all other parties to the appeal. Administrative Procedure P10-3-13(A) & (B), 4 Code Colo. Reg. 801-2 (1987).

Here, although plaintiff was provided with much of the information he requested concerning the examination he was challenging, he was denied access to certain information he sought in the administrative appeal process, including access to the answers submitted by any of the candidates for the position, certain scoring information, and parts of the "examination

construction record."

The panel ruled that the materials denied to plaintiff were confidential, and we find no error in this ruling. To the contrary, based on our review of the record, we agree with the district court that plaintiff was provided with everything he was entitled to receive under the director's regulations because all of the information he was denied was "confidential examination material" exempt from disclosure to him under the director's regulations. See Administrative Procedures P10-3-12(B) & P10-313(A), 4 Code Colo. Reg. 801-2 (1987); see also §24-72-204(2)(a)(II), C.R.S. (1988 Repl. Vol. 10B) (Open Records Act provision authorizing denial of disclosure of "[t]est questions, scoring keys, and other examination data" in connection with an "examination for employment"); Civil Service Commission v. Pinder, 812 P.2d 645 (Colo. 1991) (upholding denial of disclosure of promotional examination to party in interest under Open Records Act).

Plaintiff's reliance on Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980) in support of a contrary result is misplaced. In Martinelli, a civil action filed in district court, the supreme court, citing certain exemptions in the Open Records Act, held that it does not supplant discovery practice in civil litigation. However, here, plaintiff had no discovery rights which were inconsistent with the applicable provisions of the Open Records Act.

Plaintiff argues that the denial of access to the confidential examination material violated his due process rights in the administrative appeal. We disagree.

Although plaintiff's interests in prospective governmental employment, without more, may not have been entitled to the protection of procedural due process, when the state, as here, establishes a statutory and regulatory scheme imposing more stringent standards on itself than are otherwise required

by the constitution, due process requires the government to adhere strictly to those standards. Carpenter v. Civil Service Commission, 813 P.2d 773 (Colo. App. 1990) (holding that unsuccessful job applicant for governmental employment had due process right to meaningful administrative appeal of rejection when regulations established right to such appeal); see Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984).

Here, plaintiff was provided with all the information he was entitled to receive under the statutory and regulatory scheme governing selection and examination process appeals. Hence, plaintiff was afforded access to sufficient examination-related materials under the applicable regulations here to satisfy his due process rights to a meaningful administrative appeal. See Anderson v. Colorado State Department of Personnel, 756 P.2d 969 (Colo. 1988) (rejecting due process challenges to comparable expedited summary

review procedures followed in administrative appeals authorized under provisions of former statute in connection with annual state employee salary and benefit surveys); cf. Carpenter v. Civil Service Commission, supra agency failed even to disclose the reason for applicant's disqualification).

Similarly, we find no due process violation in the lack of opportunity for plaintiff to present expert testimony, to cross-examine witnesses, and to file a rebuttal position statement in his administrative appeal under the statutory and regulatory scheme followed here. See Anderson v. Colorado State Department of Personnel, supra.

However, as noted by plaintiff, it appears that the Department of Revenue did not file a sealed envelope containing the answers to the examination submitted by any of the candidates for the position, including plaintiff, for review by the panel in the administrative appeal here, in violation of the applicable

regulations. See Administrative Procedures P10-3-12(B) & P10-313(A), 4 Code Colo. Reg. 801-2 (1987) (requiring the filing of all information relied on by the agency for review by the panel).

Nevertheless, we decline to reverse and remand on this basis because plaintiff did not raise any issues before the panel which would have required it to review the examination answers. Indeed, plaintiff also requested the panel to refuse to consider any information contained in the materials not provided to him. Under these circumstances, we conclude that this procedural violation constituted harmless error.

II.

Plaintiff also contends that the panel used an improper standard of review in reaching its decision in his administrative appeal and that the burden of proof was improperly placed on him in the administrative appeal. We disagree.

The standard of review applicable to the panel's determination of the administrative appeal is set forth in §24-50-112(3)(a), which provides, in pertinent part, that: "The selection and examination process action may be overturned only if the director or panel finds it to have been arbitrary, capricious, or contrary to rule or law." Moreover, the allocation of the burden of proof in such administrative proceedings is set forth in the director's regulations, which provide that: "The appellant has the burden of proving that the actions appealed were arbitrary, capricious or contrary to rule or law." Administrative Procedure P10-3-8, 4 Code Colo. Reg. 801-2 (1987).

Thus, under the applicable statutory and regulatory scheme here, the burden of proof was properly placed on plaintiff to show the panel that the selection and examination process conducted for the state lottery director position was arbitrary, capricious, or contrary

to rule or law. Section 24-50-112(3)(a); Administrative Procedure P10-3-8, 4 Code Colo. Reg. 801-2 (1987); see Renteria v. Colorado State Department of Personnel, 811 P.2d 797 (Colo. 1991) (holding that similar burden of proof was properly placed on appellant in administrative appeal brought under provisions of comparable statute concerning the allocation of positions in the state personnel system); see also §24-4-105(7), C.R.S. (1988 Repl. Vol. 10A) (APA provision requiring the proponent of an order to have the burden of proof in administrative proceedings).

Consequently, contrary to plaintiff's argument, there is no requirement under this standard of review that the hiring agency's action in a selection and examination process appeal be supported by "substantial evidence." Rather, as noted by the district court, the "substantial evidence" standard of review applies to judicial review of the panel's decision, not to the panel's review of the

hiring agency's action in a selection and examination process appeal. Compare §24-50-112(3)(a) and Administrative Procedure P10-3-8, 4 Code Colo. Reg. 801-2 (1987) with §§24-4-106(7) & 24-4-106(11)(e), C.R.S. (1988 Repl. Vol. 10A).

III.

We also reject plaintiff's arguments as to the merits of the selection and examination process action here.

Most of plaintiff's arguments on appeal before this court challenging the propriety of the selection and examination process conducted for the state lottery director position were not raised before the panel in the administrative appeal. Inasmuch as judicial review of an administrative agency determination is limited to the record before the agency, Anderson v. Colorado State Department of Personnel, supra, we decline to consider these arguments on appeal.

In addition, to the extent that

plaintiff's arguments challenging the propriety of the hiring agency's actions here were raised in the administrative appeal and were rejected by the panel, we find no error in the panel's rulings.

The hiring agency's actions are vested with a presumption of regularity and validity, and, as noted above, plaintiff had the burden of showing that the hiring agency's actions were arbitrary, capricious, or contrary to rule or law. See Administrative Procedure P10-3-8, 4 Code Colo. Reg. 801-2 (1987); Anderson v. Colorado State Department of Personnel, supra; Eliopulos v. Colorado State Personnel Board, 705 P.2d 1035 (Colo. App. 1985). And, we will not substitute our judgment for that of the panel as to the weight to be accorded to plaintiff's evidence and arguments challenging the propriety of the hiring agency's actions here.

To the contrary, we find ample support in the administrative record for the panel's

rulings that the hiring agency followed acceptable practice in the development, conduct, and scoring of the examination and that the hiring agency's actions were not arbitrary, capricious, or contrary to rule or law. These rulings, therefore, will not be disturbed on review. See Anderson v. Colorado State Department of Personnel, supra; Renteria v. Colorado State Department of Personnel, supra.

Accordingly, the district court properly upheld the panel's decision, and its judgment is affirmed.

JUDGE JONES and JUDGE ROTHENBERG concur.

ORDER BY
COLORADO STATE DISTRICT COURT

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 89 CV 10507, Courtroom 5

ORDER

JAMES E. GARNER,

Plaintiff,

V.

COLORADO STATE DEPARTMENT OF PERSONNEL and COLORADO STATE DEPARTMENT OF REVENUE,

Defendants.

Plaintiff seeks judicial review of the Colorado Department of Personnel's decision of the review panel regarding selection and examination process appeal, which denied plaintiff's appeal of the selection and examination process for the position of state lottery director.

Plaintiff claims that he had a right of discovery in his administrative appeal of the personnel selection and examination process taken under C.R.S. 24-50-112(3)(a) and that the

failure to permit discovery prior to the administrative hearing is sufficient grounds to vacate the decision of the hearing; that the selection and examination procedure was arbitrary and capricious and that the agency action was unsupported by substantial evidence; and that the decision of the panel should be vacated as the panel failed to require substantial evidence in the record as whole supporting the agency action.

Plaintiff contends that the appeal was a "hearing" rather than a "review" and as such was subject to the provisions of §24-4-105 of the APA providing for discovery. C.R.S. 24-4-107 provides that the APA does not apply "where there is a conflict between this article and a specific statutory provision relating to a specific agency." A general rule of statutory construction is that a specific statute prevails over a general one. Shoenberg Farms, Inc. v. People ex rel. Swisher, 444 P.2d 227 (1968).

Here, the specific statute §24-50-112, provides for the establishment of procedures for examination appeals by the director of the State Personnel Department. The director has promulgated such procedures. Personnel procedure P10-3-12, 4 CCR 801-2 (8-87) sets out the procedure for the filing of position statements by the appellant and the agency in the appeal process. P10-3-12(b) provides that the agency must provide to the panel members all of the information and documentation which was relied upon by the agency in making the decision being appealed and that

> this information (except confidential examination material) shall be made available to the appellant by the agency for inspection prior to the time the appellant is required to file his written position statement.

The record shows that all of these procedures were followed; the plaintiff received everything he was entitled to according to the personnel procedures.

The decision of the review panel that the

procedure for appeal provided for in 24-50-112 is for review in a summary fashion on the basis of written materials and that these procedures do not provide for the panel to require discovery nor add steps to the process is affirmed.

The due process issue raised by plaintiff has no merit. White v. Office of Personnel Management, 787 F.2d 660 (D.C. Cir. 1986); Bigby v. City of Chicago, 766 F. 2d 1053 (7th Cir. 1985).

The plaintiff additionally argues that the selection and examination procedure was arbitrary and capricious and that the agency action was unsupported by substantial evidence. If there was any competent evidence supporting the panel's decision the Court must affirm the panel's factual findings. Noe v. Dolan, 197 Colo. 32, 589 P.2d 483 (1979). There is a presumption of regularity and validity which attaches to proceedings conducted by administrative agencies and absent evidence to

the contrary it is presumed that such agencies have properly discharged their official duties. Hadley v. Moffat County School District RE-1, 681 P.2d 938 (Colo. 1981).

Here, the panel was to review the evidence based on the allocation of the burden of proof in personnel procedure P10-3-8 which provides that plaintiff has the burden of proving that the actions appealed were arbitrary, capricious or contrary to rule or law. A review of the record shows that the panel addressed each of the plaintiff's allegations and made findings as to each. The panel had access to all of the evidence and did not find by a preponderance of the evidence that the examination was conducted arbitrarily or capriciously. This decision is supported by substantial evidence in the record and the Court affirms the panel's order that the examination results stand.

The Court has considered the plaintiff's final argument that the decision of the panel should be vacated as the panel failed to

require substantial evidence in the record as a whole supporting the agency action and finds that it has no merit. The plaintiff has confused the standard of review required for the reviewing court with that required for the appeal panel.

The Court must view the whole record and when viewed in that light the Court finds and concludes that the findings of fact are supported by substantial evidence and accordingly the findings and judgment of the review panel will not be disturbed and are hereby affirmed.

Dated this 10th day of July, 1990.

BY THE COURT:

Robert S. Hyatt
District Court Judge

cc: All counsel.

DECISION OF REVIEW PANEL REGARDING SELECTION AND EXAMINATION PROCESS APPEAL

DECISION OF DIRECTOR/REVIEW PANEL REGARDING SELECTION AND EXAMINATION PROCESS APPEAL

Case Number: 889*-0329-EX-0151

Appellant(s) Name(s): James E. Garner

Class Title: State Lottery Director

Agency of Vacant Position: Department of Revenue

Date of Action: March 17, 1989

Agency Conducting Selection and Examination Process: Department of Revenue

Appellant's Representative on Appeal: N/A

Panel Members
Director's Designee: Jeanne Ricker
Appellant's Designee: James L. Peaslee
Third Panel Member: William G. Maier

Issue(s) Presented for Review: See attached

Remedy requested by Appellant(s): See attached

CASE NUMBER: 889-0329-EX-0151

Date Director/Panel Reviewed Appeal:
May 19, 1989

Date Director/Panel Heard Oral Statement:
N/A

Person(s) Who Participated in Oral Statement:
N/A

Issue(s) Presented for Review:

Does the Review Panel have the authority to deviate from established procedure and permit discovery of certain items and allow the appellant the right of rebuttal.

Should the examination be overturned if there is factual basis in the allegations that:

1) there was no relationship between the test questions and the factors they were intended to assess;

2) the examination evaluators were not qualified to assess one of the factors, "Marketing Knowledge and Ability";

3) at least one evaluator had a conflict of interest that disqualified her as an impartial judge;

4) the respondent failed to establish objective guidelines for evaluating the two written instruments;

5) the instructions to evaluators called for a subjective method of scoring which resulted in bias;

6) that this was a test of performance for which "common criteria" was (sic) not set and that written exercise #II was an irrational method of evaluating experience;

7) that the criteria used to evaluate the written exercises were arbitrary and capricious;

8) that the lack of anonymity combined with the lack of objective guidelines made the examination susceptible to manipulation and, therefore, contrary to law;

9) the content of the first question may (emphasis added) reflect the respondent's bias against open competitive testing.

Remedy Requested by Appellant:

1) That the Review Panel should order discovery of certain test materials or refuse to consider any information contained in materials not provided to the appellant.

2) That the respondent's position statement be made available to the appellant and that he be given the right of rebuttal.

3) That the examination be overturned and the appellant be afforded the opportunity to take a new test.

Findings of Fact:

Administrative notice is taken of CRS 24-50-112(3)(a), CRS 24-72-203-4, and Director's Procedures Chapter 10, Article 3.

The Statute empowers the state personnel director to establish procedures for appeals concerning the selection and examination process.

This Panel is convened in accordance with statute and the Director's procedures which govern the conduct of this Panel's review. In

part, the statute provides that the "...panel shall review the appeal in summary fashion on the basis of written material ... ". These procedures do not provide for the Panel to require discovery nor add steps to the process.

The materials denied the appellant are confidential under Colorado's open records act.

The Panel is not authorized to make decisions on issues of law which is judicial function beyond the scope of the Panel.

On its face, written exercise #I speaks to analytical ability in that it presents a problem which must be "analyzed" before the response was prepared. No compelling argument was presented to support the allegation that it did not examine for analytical ability.

The appellant asserts and the panel agrees that Question #II does not specifically elicit information regarding the candidates' "Marketing Knowledge and Ability." But, every question does not have to measure every factor. Question #1 provided opportunity for

information regarding marketing knowledge and abilities to be presented by the candidates.

The assertion that the evaluators were not qualified to assess "Marketing Knowledge and Ability" is supported only by the opinion of the appellant. No evidence was presented to support this opinion.

The fact that one evaluator was acquainted with two of the candidates does not in and of itself prove a conflict of interest or the bias of the evaluator.

The allegation that this evaluator was somehow dishonest is totally unsupported.

The rating guidelines are the same as a rating key. A review of these guidelines indicates they meet the criteria required by standard personnel testing procedures.

It is accepted test practice to use two or more questions to determine ratings for each factor. It is also appropriate to use two separate instruments (an essay and an achievement based evaluation of training and

experience, ABT&E) as the basis for determining ratings which were noted on a single rating sheet.

There is no requirement that the briefing of evaluators be recorded nor is it done as a matter of practice.

Documentation was presented that indicated the briefing of the evaluators was conducted in a manner consistent with accepted practice.

In all cases where raters are evaluating candidates, they are required to use their professional judgement even in the presence of comprehensive rating guidelines. Even an objective exam such as a multiple choice test is based upon the subjective judgements of professionals who choose and/or develop the questions and answers.

No documentation was presented to substantiate the charge that the instructions to evaluators called for subjective scoring resulting in bias and prejudgment in the ratings.

Experience is an excellent predictor of future success in the same or similar field of work.

Documentation was presented that indicated all candidates were evaluated based upon the same criteria. There was a single set of rating guidelines which the evaluators used for all candidates.

The documentation shows that the rating guidelines were developed as a result of a thorough job analysis and reflected the requirements for success as defined by the subject matter experts. While the comments made by the evaluators were subjective, this does not show that the ratings were based on anything other than the guidelines which were not subjective.

There is no requirement for anonymity in an examination process.

The respondent agency could have chosen to limit competition in this examination to its

own employees. Instead, it chose to open the recruitment to all and requested and received permission from the State Personnel Board to even recruit nationally.

Conclusions and Order:

The Panel is not empowered to deviate from the procedures established by the Director.

The Panel carefully reviewed each issue and allegation along with the arguments presented. In each it was found that substantive facts and/or documentation were not presented to support the allegations.

Documentation was provided that the agency followed acceptable practice in the development, conduct and scoring of this examination.

Baring (sic) evidence to the contrary, the Panel must uphold the action of the agency and the examination.

The actions of the agency were not arbitrary, capricious nor contrary to rule or law. The Panel orders the examination results

to stand as they have been determined by the agency.

APPELLANT'S POSITION STATEMENT
(EXCERPTS)

APPELLANT'S POSITION STATEMENT

This position statement has two parts. The first part deals with procedural defects that you, as the Selection and Examination Review Panel, have the legal authority to remedy to permit a fair hearing on the merits of this appeal. These defects relate to the right of discovery, which affords parties to an administrative hearing the equal opportunity to inspect documents and obtain the information necessary to prepare their case. The second part of this position statement deals substantively with the examination process, focusing on the two written exercises by which I was removed from consideration for the position of State Lottery Director. In the second part I demonstrate that the examination process was arbitrary, capricious and contrary to Colorado and federal law.

Part I - Procedural Defects

Relief Sought

I am requesting the Panel to compel the Department of Personnel and the Department of Revenue to permit discovery of the items that I have been wrongly denied and that are necessary to prepare this appeal. In the alternative, the Panel should refuse to consider any defenses or facts asserted by the Respondent that relate to the materials I was wrongfully denied.

The Department of Personnel procedures I received do not specify that the Appellant is provided with the Respondent's position statement or an opportunity to prepare and submit a rebuttal. Therefore, I am requesting the position statement and the right of rebuttal. As the Respondent is furnished with the Appellant's position statement and the right of rebuttal, fundamental fairness demands that both parties be treated equally.

Statement of Facts

On March 16, 1989 I received notification of test results, dated March 13, from Neil Peters, Personnel Director of the Department of Revenue (see A-1). On March 17 I telephoned Mr. Peters to specify the information needed to prepare my appeal. I repeated my request for information and documents in my March 17 letter of appeal to the Colorado State Personnel Director, who received the letter by certified mail on March 22 (see A-2). A copy of this letter was sent by ordinary mail to Mr. Peters, who probably received it on March 22 also.

Including the March 17 letter, I have sent seven letters either to the Department of Personnel or the Department of Revenue, with copies to the other agency, seeking the materials I needed to prepare my case (see A-2 through A-8). In addition, I have made innumerable telephone calls, including calls to Michael Serruto, Assistant Attorney General assigned to the Department of Personnel, and to

Maurice Knaiser, Deputy Attorney General assigned to the Department of Revenue, advising them of their client's failure to permit discovery.

Despite these efforts, I received no information, except an April 3 letter covering an innocuous rating scale (A-9), until April 11, when I received an April 10 Federal Express from Mr. Peters (A-10). This package contained a copy of a March 27 letter to me from Mr. Peters (A-11), which I had not previously received. While I did receive the job applications I had requested (except for the attachments to Ralph Decker's application form), Mr. Peters denied most of the requested items, citing the Public Records Act (Colorado Revised Statutes 24-72-204). Among the documents denied were items numbered 1-4 and 6-8 in my March 17 letter (A-2).

The April 10 letter contained a description of the examination construction record (A-12), but copies of documents from the

examination construction record were not sent. I believe these documents were previously included in my March 31 request (A-3) for "information that will be used at the appeal to demonstrate the validity of the test." Also, on April 14 I FAXed a request to Mr. Peters for the examination construction record by its specific name (A-6). This letter, a copy of which went to Appeals Administrator JoAnna Miller, cited Colorado case law exempting discovery in civil litigation from the Public Records Act.

In reply, Appeals Administrator JoAnna Miller asserted that I had no right of discovery, but agreed to obtain a determination on this issue from Mr. Serruto, the Assistant Attorney General assigned to the Department (see A-13).

Statements of Law

Statute says this proceeding is a "hearing" and uses that word to describe it (C.R.S. 24-50-112.3a). You, as members of this

Panel, are "hearing" this matter. By statute, you are hearing officers, and, as hearing officers, you have the authority to compel the Department of Revenue and the Department of Personnel to permit inspection of relevant documents. "Any agency conducting a hearing, any administrative law judge, and any hearing officer shall have authority to: Administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof and receive evidence; dispose of motions relating to discovery and production of relevant documents and things for inspection, copy, or photographing" (C.R.S. 24-72-204).

Mr. Peters cited the Public Records Act as an absolute defense against permitting discovery of relevant documents. This assertion is incorrect. The Supreme Court of Colorado (1980) ruled that "the legislature did not intend that open records laws would supplant discovery practice in civil litigation. The open records laws are

'directed toward regulation of the entirely different situation of general exploration of public records by any citizen during general business hours."' A copy of this case, Martinelli, is enclosed (A-14).

According to Martinelli, the Respondent needs to justify non-disclosure. He must prove that (a) disclosure would be harmful to the public interest and (b) this alleged harm outweighs a civil litigant's fundamental right to prepare his case. In fact, the Respondent cannot establish any harm that would result from disclosure.

Justifications for non-disclosure of "test questions, scoring keys, and other examination data," items listed in the Public Records Act, deal with the ability to use the same civil service test in the future and the investment that would be needed to replace that test. Clearly, these justifications do not pertain to the examination for State Lottery Director. This was a take-home test, which was

administered on the honor system. The first question dealt with current circumstances of the Colorado Lottery, and, therefore, would not be used in future examinations for this position. The second question concerned personal experience. No one could copy someone else's answer.

Even if the Respondent made the absurd assertion that the Department of Revenue may wish to use the same test in the future, a civil litigant's fundamental right to prepare his case clearly outweighs the minimal cost of modifying this test.

Furthermore, disclosure of the essays would in no way injure the five other candidates who took this test. There is no confidential information in their answers, which were carefully prepared and edited. However, were the Respondent to assert harm to the other candidates, "this harm is the cost of doing business with the government and ... the benefits associated with disclosure outweigh

the costs" Freedom News v. Denver & Rio Grande R. Co. 731 P.2d 740 (Colo. App. 1986).

Part II - The Examination Process

Statements of Law

Statute gives this Panel the authority to-overturn a selection and examination process that is "arbitrary, capricious, or contrary to rule or law" (C.R.S. 24-50-112). Black's Law Dictionary (3rd ed.) defines arbitrary as "not supported by fair, solid, and substantial cause and without reason given." Both the Oxford English Dictionary and Webster's New World Dictionary (college ed.) say that arbitrary may mean capricious. From these definitions and Colorado law, it follows that an examination process must be supported by fair, solid, and substantial cause.

The standards to be met by a civil service test are further clarified by Spickard v. Civil Service Commission of the City and County of Denver (1972). A copy of this case is enclosed (A-15). In Spickard the Colorado Court of

Appeals ruled that the Denver Civil Service Commission had a "responsibility to give a fair examination and evaluation consistent with the civil service provisions of the city charter." Clearly, the Department of Revenue had a responsibility to give a fair examination consistent with the civil service provisions of the Colorado State Constitution, which states:

> Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without-regard to race, creed, or color, or political affiliation (XII-13-1).

In Spickard the Court also found that "the purpose of a civil service system is to obtain the person most fit for a position through a competitive and impartial method." To accomplish this purpose, the Court required a "common criteria in ascertaining merit." Otherwise, the examination would be neither competitive nor impartial.

Like Colorado state law, federal law demands that personnel examinations be ...

CIVIL SERVICE TEST
FOR
STATE LOTTERY DIRECTOR

EXPERIENCE EVALUATION

for

STATE LOTTERY DIRECTOR

Please describe what you consider to be your major achievements demonstrating that you have the experience, skill or ability necessary to perform successfully as the Colorado Lottery Director. These achievements will receive highest credit to the extent that they are reflective of experience in high level management positions in a state lottery program. See the following page for details.

The achievements may be either specific incidents or examples of sustained high performance over a period of time. Choose what you consider to be the best examples of your accomplishments. Examples should be drawn from experiences clearly relevant to the duties and responsibilities of this position.

It obviously takes thought and work to present this information about yourself fully

and clearly. We are asking you to carefully go through this process because shortcut, easy-to-use procedures may not completely describe your experiences.

Writing ability will be rated from your response. Your response must be type-written and double-spaced. Please type your social security number on the top of each page of your materials. Do NOT put your name on anything which is to be evaluated.

****

I certify that all of the statements made in this experience evaluation from (sic) are true, complete and correct to the best of my knowledge and belief, and are made in good faith. I understand that any misrepresentation may be grounds for removal of my name from the eligible list.

_____ _____

Signature (please sign in ink) Date

_____

Printed Name

WRITTEN EXERCISE

I. Management Problem

The problem outlined below bears a good deal of similarity to the current situation of the Colorado Lottery; however, not all of the facts given you may be true of the Lottery. That is, this should be treated as a hypothetical situation.

Assume that you have been offered the job of Colorado Lottery Director and your supervisor (the Executive Director of Revenue) has asked you to develop an operational plan for the coming year as well as a strategic plan for the next five years. He explains that in its first few years of operation the Lottery's main emphasis was on gaining public acceptance by creating an image of an organization that is "squeaky clean." This has been accomplished by having a law enforcement representative appointed to the Lottery Commission, developing very stringent requirements for hiring

employees and licensing sales outlets, developing a comprehensive accounting system, and implementing many internal control systems. All of this was done largely in response to opposition on the part of legislators and other government leaders who had repeatedly expressed fears that the lottery could somehow be the entry point for organized crime into Colorado. The Lottery has been very successful in fostering the desired image of integrity.

Your supervisor states that he senses it is time for a change in the management objectives of the organization. Legislative concerns about honesty and integrity have been supplemented by concerns about how well the Lottery is being managed. Declining sales and a certain amount of jadedness on the part of the public are also causing concern. Budget requests are being carefully scrutinized, and the Lottery has been asked to justify its current staffing level. The Legislature and the Executive Director view the Lottery as a

profit-making enterprise, unlike other State agencies, and they are looking to the Lottery Director for both increased profits and a "private sector" approach to management and marketing. Your supervisor says that it is expected that the Lottery must be run like a profitable business and to bring in millions of dollars of additional revenues which the State needs. He looks to you to determine what changes need to be made and how to bring these changes about in the context of maintaining the integrity and honesty of the Lottery.

Specifically, you are asked to give your boss a written plan for the future including:

- an explanation of how you will determine what changes to make;
- a listing of the business, marketing, organizational, political, and policy issues that must be addressed; and
- an initial, but well-thought-out, listing of the things you think you will find need to be changed, and how you will go about

implementing such changes. (This should address issues like business practices, marketing strategies, change management, human resource utilization, and public perception.)

Your written plan should not exceed five pages (typewritten and double spaced).

II. Assessment of Management Achievements

In not more than three typewritten pages you are to provide a detailed explanation of one of your achievements demonstrating that you have the management ability necessary to direct the Colorado Lottery. Your submission should include:

- Specifically what did you achieve and how?
- What the problem or objective was?
- Describe the process you used in analyzing the program or project and list the objectives you established.
- If the example was a distinct project, what project management techniques did you use? (e.g., CPM, Gantt Chart, etc.)
- What resources were under you control-number of staff members, size of budget?
- How did you evaluate or measure "success?"
- What problems did you encounter and how did you deal with them?
- What was innovative about your approach to problem solving?

- How did you make a difference in managing this project or program?
- The name and telephone number of someone who can verify the information.